

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGE OF COMPENSATION CLAIMS
WEST PALM BEACH DISTRICT

Mark Zakian,
Employee/Claimant,

vs.

OJCC No.: 14-016589TMB
JUDGE: Timothy M. Basquill
D/A: 12/22/2013

City of Palm Beach Gardens Police
Department/Florida League of Cities,
Employer/Carrier.

FINAL COMPENSATION ORDER

After due notice to the parties in the above-referenced-matter came on to be heard before the undersigned Judge of Compensation Claims on October 9, 2015, at Palm Beach County, Florida. The Claimant was represented by Tonya A. Oliver, Esquire, and Allyson Skiles, Esquire. The Employer/Carrier/Service Agent was represented by Damian Albert, Esquire.

Certain stipulations were entered into between the parties and accepted by the undersigned Judge of Compensation Claims.

STIPULATIONS

1. The Judge of Compensation Claims has jurisdiction over the parties and the subject matter of this claim;
2. Venue is proper in Palm Beach County, Florida;
3. Date of accident is December 20, 2013;
4. Mediation was held on November 20, 2014 and May 15, 2015;
5. There was an employer/employee relationship on the date of accident;
6. Workers compensation insurance coverage was in effect on the date of accident;

7. The case is not governed by managed care.

The parties have been unable to resolve the following **ISSUES**:

The Claimant has made the following claims that remain unresolved:

1. TTD/TPD from 12/22/2013 to present and continuing at the appropriate average weekly wage;
2. Reimbursement of medical expenses totaling \$2,186.32;
3. Claimant's requests for authorization of medical care and treatment with a cardiologist, a primary physician or an internal medicine specialist for heart disease and anything further recommended by such authorized physicians;
4. Compensability of heart disease pursuant to F.S. Section 112.18(1);
5. Permanent impairment rating of 21% as opined by Dr. Pianko with a medical maximum improvement date of 1/6/2015;
6. Penalties, interest, attorney fees and costs.

The Employer/Carrier has alleged the following **DEFENSES**:

1. No indemnity due or owing, claim controverted;
2. No medical reimbursement due or owing, claim controverted;
3. Authorization not due or owing, claim controverted;
4. Claim not compensable, Claimant failed to meet statutory notice requirements; claimant's condition was caused by a viral infection unrelated to his employment as a law enforcement officer. Virus not contracted in course and scope of employment. Claimant does not merit application of presumption under Section 112.18, Florida Statute.
5. No attorney fees and costs are due and owing;
6. No penalties and interest due and owing.

EVIDENCE

1. The EMA report of Dr. David Perloff (JCC #3);
2. Deposition transcript and exhibits of EMA, Dr. David Perloff (Joint #1);
3. Deposition transcript with exhibits of Dr. Steven Borzak (E/C/SA #2);
4. Deposition transcript with exhibits of Dr. Leonard Pianko (CL #1);
5. Deposition transcript with exhibits of Adjuster William Horvath (CL #3);
6. Deposition transcript with exhibits of Adjuster Kim Odom (CL #2);
7. 13 week wage statement (E/C/SA #1);
8. Payroll records (E/C/SA #3);
9. Excerpts from the Claimant's personnel file (E/C/SA #4) (REBUTTAL);
10. Notice of Injury of December 22, 2013 (Joint #5) ;
11. Notice of Denial dated June 10, 2014 & July 30, 2014 (Joint #2);
12. Medical records for fact evidence of Palm Beach Gardens Medical Center (Joint #3);
13. Medical records for fact evidence of Mount Sinai Medical Center (Joint #4);
14. Claimant's pre-employment physical (CL #5);
15. Petition for Benefits filed on July 22, 2014, January 26, 2015; & February 19, 2015
(CL #4);
16. Order Approving Uniform Pre-Trial Stipulation of January 22, 2015;
E/C/SA First Amendment to the Pre-trial Stipulation of April 1, 2015, and
Claimant's Supplemental Uniform Pre-Trial Stipulation of September 10, 2015
(JCC #1);
17. Order appointing EMA (JCC #2), and
18. Notice of Final Hearing (JCC #4).

Live testimony was provided at the hearing:

1. The Claimant, Mark Zakian;
2. Heather Zakian, Claimant's Wife;
3. Assistant Chief City of Palm Beach Gardens Police Department, Clint Shannon.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In making my finds of fact and conclusions of law in this claim, the undersigned has carefully considered and weighed all the evidence presented, including the live testimony and documentary evidence. I observed the candor and demeanor of the live witnesses, Mark Zakian, Heather Zakian and Assistant Chief Shannon. The trial memoranda and argument of counsel were also considered. The undersigned has resolved all conflicts in evidence and distilled the testimony and salient facts together with the findings and conclusions necessary for resolution of this claim. The undersigned has not painstakingly summarized the substance of the medical records, live testimony or deposition testimony, or any other evidence presented, except to the extent necessary to resolve those issues presented for adjudication. This does not mean that the undersigned has failed to consider all the evidence presented. Based upon the foregoing, the undersigned hereby makes the following findings of fact and conclusions of law.

1. The foregoing stipulations of the parties are consistent with the evidence presented and are adopted as findings of fact.
2. Claimant is a forty-four (44) year old law enforcement officer, currently assigned to the K-9 Unit for the City of Palm Beach Gardens Police Department.

3. Claimant began his career with the department on May 15, 1998. Upon hire, Claimant underwent a pre-employment physical which had no evidence of heart disease.
4. On December 22, 2013, the Claimant was at home on paternity leave with his newborn daughter, Harper, as he had been since October 31, 2013. He began to feel ill, had difficulty breathing, and felt pressure/heaviness in his chest. His wife transported him to Palm Beach Gardens Hospital. The Claimant was diagnosed with pericarditis, a form of heart disease, and treated with medications; he was released a couple of days later. On January 3, 2014, he experienced recurrent chest pain and abdominal pain and reported to the emergency room. He was admitted and was eventually brought to the operating room for a surgical procedure to drain approximately 1.5L of excess fluid surrounding his heart as a result of the pericarditis. He was in the hospital for approximately six days and released with medications. Multiple tests were done to determine the etiology of the pericarditis. Initial tests results were positive for the Coxsackie A titer and tuberculosis. The Claimant had a third hospitalization related to his pericarditis on January 24, 2014. He returned to the emergency room due to difficulty breathing and chest pain and was eventually taken again to the operating room for emergent open heart surgery to remove the pericardium which had thickened as a result of the pericarditis. On February 10, 2014, the Claimant was hospitalized for a fourth time due to a high fever. He was transferred from Palm Beach Gardens Medical Center to Mt. Sinai Hospital in Miami for further testing and labs. He was ultimately discharged on

February 17, 2014. He was allowed to return to work on or about April 29, 2014, to light duty and later released to full duty on September 8, 2014.

5. Upon his return to light duty, Officer Zakian submitted a Notice of Injury accepted by the division on May 28, 2014. The testimony established that Assistant Chief Shannon had actual knowledge of the first and subsequent hospitalizations beginning in December 2013. In addition, the testimony established that Heather Zakian, wife of Mark Zakian, notified Human Resources and assisted in completing the FMLA paperwork for the Claimant. Heather Zakian was provided an officer liaison to communicate the Claimant's condition to the agency.
6. A Notice of Denial was filed on June 10, 2014.
7. Claimant filed a Petition for Benefits June 22, 2014, January 23, 2015, and February 19, 2015, for benefits associated with this claim under Florida Statute 112.18.(1).
8. I find that the notice defense fails as the Claimant provided actual notice pursuant to Florida Statute 440.185(a). Giving notice of a work-related injury to a supervisor provides adequate notice to the employer of an injury. Hester v. Westchester General Hospital, 260 So. 505 (Fla. 1972). Notice of a workers' compensation claim occurs when an employer first receives sufficient information upon which to begin an investigation. Herb's Exxon v. Whatmough, 487 So. 2d 1169 (Fla. Dist. Ct. App. 1st Dist. 1986).
9. Florida Statute 112.18(1), sets forth a presumption of compensability for claimants meeting the following four (4) elements or criteria:
 - a. Claimant is a member of the protected class (firefighters, law enforcement officer, corrections officers);

- b. Claimant suffers from a protected condition (hypertension, heart disease or tuberculosis);
- c. Claimant underwent and passed a pre-employment physical without any evidence of the condition claimed, and
- d. The condition resulted in a disability.

10. I find that the Claimant has sustained his burden to prove entitlement to the presumption. One, he is a member of the protected class. Two, he suffers from pericarditis—a form of heart disease. Three, he underwent a pre-employment physical that revealed no evidence of the condition claimed. Finally, it is clear that the Claimant suffered a disability beginning on December 22, 2013, with his initial hospitalization for pericarditis and his three subsequent hospitalizations for treatment of the same until he was released to light duty on April 29, 2014, and full duty on September 8, 2014.

11. I find that when the presumption applies in Florida Statute 112.18, the claimant's burden of proving major contributing caused by medical evidence is fully met, and the burden then shifts to the E/C/SA to overcome, or rebut the presumption by showing a specific non-occupational cause of the claimed condition.

12. Case law has clarified that an injured worker is under no obligation to present evidence of occupational causation to support a claim under the presumption beyond what is necessary to establish the applicability of the presumption. The burden of proof in rebutting the presumption however depends on the existence of evidence in support of the 112.18(1) presumption. If the injured worker solely relies on the

112.18 presumption to support his claim, the E/C/SA can rebut the presumption with competent evidence.

13. In the instant case, the Claimant relies solely on the presumption and I find the standard to rebut the presumption is competent evidence. I further find that the E/C/SA has not met its' burden by competent evidence to rebut the presumption. The E/C/SA must show that the major contributing cause or causes of the Claimant's heart disease is something other than his employment, based upon objective medical findings found through physical examination and/or diagnostic testing within a reasonable degree of medical certainty.

14. Pursuant to the E/C/SA motion, this Court appointed Dr. David Perloff as an Expert Medical Advisor. An EMA's opinion is presumed to be correct as a matter of law. Dr. Perloff testifies that there is no objective medical evidence to determine whether the Coxsackie A virus caused the Claimant's acute pericarditis. Even if one were to assume that the Coxsackie A virus caused the pericarditis, there is no way to determine where it was contracted. Dr. Perloff testified that he had discussed the Claimant's duties as a police K-9 officer and he was aware that, despite the Claimant's paternity leave, the Claimant's assigned K-9 partner remained at home with him. Dr. Perloff was also aware that the Claimant visited the police department regularly to get food (for the dog) and to retrieve his mail. Dr. Perloff opined that there is no objective test to run to determine whether the Claimant contracted the Coxsackie A virus at the police department, the pediatricians' office, or at the hospital.

I accept the presumptive opinions of Dr. Perloff and find that there is no clear and convincing evidence to the contrary.

15. If the presumption applies, a claimant is under no obligation to establish occupational causation redundantly. The E/C/SA must prove that he did not get the virus at work and failed to carry the burden. There is no medical evidence to disprove the presumption. The mere existence of a virus does not establish causation, the E/C/SA must establish that the Claimant did not acquire the virus at work. While the medical opinions are in agreement that the Claimant most likely did not contract the virus at work, I find that type of opinion does not constitute competent evidence. Absent an opinion to a reasonable degree of medical certainty that the virus was not contracted at work, I find that the E/C/SA has failed to rebut presumption.

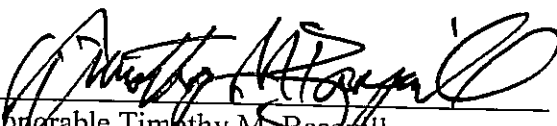
I find that the E/C/SA failed to establish that the virus caused this Claimant's pericarditis, and even if the a virus did cause the pericarditis, the E/C/SA failed to establish with objective medical evidence that the virus was not contracted at work.

WHEREFORE, it is the **ORDERED AND ADJUDGED** of the undersigned Judge of Compensation Claims that:

1. The claim for compensability of Claimant's heart disease, pericarditis, is **GRANTED**
2. The claim for temporary total disability from December 22, 2013 through April 29, 2014; temporary partial disability from April 30, 2014 through September 8, 2014, plus penalties and interest is **GRANTED** subject to any payroll offsets.
3. The claim for authorization of care with a board certified cardiologist or other qualified physician is **GRANTED**;

3. The claim for authorization of care with a board certified cardiologist or other qualified physician is **GRANTED**;
4. The claim for payment of medical bills attached to the petition for benefits is **GRANTED** subject to the workers compensation fee schedule;
5. The claim for permanent impairment benefits of twenty-one (21) percent with a medical maximum improvement date of January 6, 2015, with penalties and interest is **GRANTED**.
6. The Claim for attorney fees and costs is **GRANTED**, jurisdiction is reserved as to the amounts thereof.


DONE AND ORDERED in Chambers in Palm Beach County, Florida.



Honorable Timothy M. Basquill
Judge of Compensation Claims

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing order was entered and a true copy was furnished by electronic transmission on this 4th day of November, 2015 to counsel of record, or the parties by regular U.S. mail, if unrepresented:



Assistant to the
Judge of Compensation Claims